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EIGHTH REPORT ON STATE RESPONSIBILITY

by

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Addendum

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Introduction

47. The issues of Parts Two and Three of the project other than the regime of crimes, to which the Special Rapporteur believes that further thought should be given by the Commission (in plenary and/or in the Drafting Committee) are the following: (i) the role of fault in the determination of the consequences of an internationally wrongful act ("delict" or "crime"), particularly with regard to satisfaction; (ii) the dispute settlement provisions of Parts Two and Three; and (iii) the factors to be considered for the purpose of assessing proportionality of countermeasures (in connection with "crimes" as well as "delicts"). The said issues are dealt with in that order in the following sections.

(i) The Role of Fault in General and in Connection with Satisfaction

48. In the opinion of the Special Rapporteur - as well as in the opinion of other scholars - the problem of fault has not been dealt with satisfactorily, if at all, in Part One of the project. It is therefore to be hoped that the matter will be taken up again, in Part One, on second reading.

49. Be it as it may, however, of the question whether fault should or not be dealt with in Part One and in what terms, the Special Rapporteur believes that fault should be expressly recognized as a factor in the determination of various consequences of internationally wrongful acts, namely in Part Two of the Project. As indicated in the second report, although the literature is not very rich on the subject, significant doctrinal authority is available 1/.

50. As regards the practice, while the impact of fault is only infrequently acknowledged with regard to compensation 2/, it emerges quite clearly - as explained in the second report - with regard to satisfaction. That impact is particularly significant regarding both (a) the role of satisfaction as a complement to pecuniary compensation or other forms of reparation; and (b) the kinds and number of forms of satisfaction claimed or obtained 3/.

51. It will be recalled that an express reference to wilful intent or negligence was contained in the draft article on satisfaction proposed in the second report 4/.

52. The necessity to take account of the fault in the determination of the degree of the wrongdoing State's liability is enhanced by the fact that the

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1/ References in the second report (document A/CN.4/425), footnote 407.

2/ Ibid., para. 182 and footnotes 409-412.

3/ Reference is made again to the second report, ibid., paras. 113 ff. with footnotes 252, 257, 261, 262. and paras. 126-134.

4/ Para. 55, *infra*.

chapeau provision on reparation (in general) - Article 6 *bis* - as adopted by the Commission on first reading, does contemplate the consequences of the fault of the injured State or his national. 5/

53. It is hardly necessary to stress that the relevance of fault is even higher with regard to the case of the internationally wrongful acts singled out as "crimes" in Article 19 of Part One as adopted on first reading. It would be difficult to contest that that particularly grave degree of fault which is generally known as wilful intent or ***dolus*** is an essential element of any one of the four kinds of crimes indicated in paragraph 3 of Article 19 of Part One, or any analogously grave acts, whatever their denomination.

54. In conclusion, a project which would not take due account of the impact of fault in the determination of the consequences of internationally wrongful acts - whether "delicts" or "crimes" - would simply overlook an important element of the ***de lege lata*** and ***de lege ferenda*** regime of State responsibility. The Special Rapporteur's position on the subject of fault - and the acknowledgement of the soundness of that position by a number of members - were well reflected in paragraphs 408 to 412 in the relevant chapter of the Commission's Report on its forty-second session 6/.

55. Partly interrelated with the relevance of fault in determining the consequences of internationally wrongful acts is the nature of the remedy - typical of inter-State relations - which goes under the name of satisfaction. In Article 10 on satisfaction, as adopted in 1993, the Commission eliminated, together with the proposed reference to negligence and wilful intent contained in the Special Rapporteur's proposal on the subject 7/, the punitive connotation of that remedy which was also present in the proposed draft Article 10. 8/ The Special Rapporteur believes that the reality of international relations indicates that the legal consequences of internationally wrongful acts are neither purely reparatory nor purely punitive. The two functions are inherent in different degrees - although in forms not easily comparable to the functions of any similar remedies of national law - in the various forms of reparation. As regards satisfaction in particular, it seems to constitute - although in the *very relative* sense explained in paragraphs 106 to 145 of the second report, especially paragraphs 135 to 145 - the form of reparation in which the punitive element

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5/ Considering that the *chapeau* provision of Article 6 *bis* (on Reparation in general) also covers satisfaction, the express mention of the injured State's (and its national's) fault inevitably aggravates the undesirable effect of the omission of any reference to fault in the provision of Article 10 on satisfaction (*infra*, para. 55).

6/ Yearbook of the International Law Commission, 1990, vol. II, Part Two, pp. 81 and 82.

7/ Paragraph 2 of Article 10 as it appeared in document A/CN.4/425/Add.1.

8/ Ibid, paragraph 1 of Article 10.

is relatively more pronounced 9/. The omission of any trace of that element obscures, in our view, not only the fact that States seek and obtain satisfaction for purposes other than strict reparation, but also the very distinctive feature of satisfaction as opposed to restitution in kind and compensation. The availability of a more precisely defined remedy of satisfaction would help, in our view, to reduce the temptation of States, and especially of strong States, to resort to forms of punitive action frequently including, under the guise of self-defence, armed reprisals. Examples are too well known and need not be mentioned at the present stage.

(ii) The Dispute Settlement Provisions of Parts Two and Three of the Project

(a) General

56. The Special Rapporteur feels duty bound to reiterate, at the present stage, his position with regard to the relationship between dispute settlement obligations, on the one hand, and the right of an allegedly injured State to resort to countermeasures against an allegedly wrongdoing State, on the other hand. As explained in his reports and in a number of oral statements, the generally recognized existence, in customary international law, of the right of the injured State to resort to countermeasures against the wrongdoing State is *per se* not sufficient to justify the inclusion of such a right in a codification convention on State responsibility without adequate guarantees against abuse. It is indisputable - as the relevant debates in the International Law Commission and the General Assembly abundantly confirm - that the traditional, current regime of countermeasures leaves much to be desired because it lends itself to abuse.

57. The rules of proportionality and the rules prohibiting given kinds of countermeasures - rules frequently infringed - are not sufficient to ensure that allegedly injured States refrain from resorting abusively to reprisals against an allegedly law-breaking State. 10/ It would therefore be improper for a body dedicated to the progressive development (more than just codification) of international law not to propose, in addition to the said rules, appropriate legal defences against any possible abuse. Such defences can only be found in adequate dispute settlement procedures.

58. It is unnecessary to reiterate here the distinction between pre-countermeasures (Pre-CMs) and post-countermeasures (Post-CMs) dispute

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9/ See, more particularly, A/CN.4/425, op. cit., footnote 329 to para. 142.

10/ The use of prohibited armed reprisals under the pretence of self-defence is only one of the major examples of such infringements, particularly on the part of strong States.

settlement obligations, and the Special Rapporteur's proposals relating to the former (draft art. 12 of Part Two) or to the latter (draft arts. 1 to 7 of Part Three). 11/

59. With regard to both pre-CMs and post-CMs dispute settlement obligations, we believe that in reviewing the matter of dispute settlement within the framework of the State responsibility project - a review that the 1996 session should do its best to accomplish - the Drafting Committee would be well-advised if it re-examined article 12 and the relevant provisions of Part Three in close conjunction. It is our view that the difficulties which have prevented the adoption of more satisfactory solutions in both areas are due in great part to the fact that draft article 12 was considered by the 1993 and 1994 Drafting Committees prior to, and separately from, the relevant draft articles of Part Three. It will be recalled that this suggestion was made repeatedly, at the time, by Ambassador Calero Rodriguez and the Rapporteur.

60. By proceeding along the line indicated in the preceding paragraph, the 1996 Drafting Committee would be in a position better to review the formulation of both sets of dispute settlement obligations in the light of their interrelation. In so doing, the Drafting Committee would be enabled to adjust more adequately the provisions in question with a view to strengthening both the defences against abuse of countermeasures and the law of dispute settlement. The Commission should realize that the necessity of strengthening those defences within the context of a project codifying for the first time the unwritten law of unilateral enforcement of international obligations, offers a most appropriate - and, in a sense, unique - opportunity to take a few valuable steps forward in the international law of dispute settlement, the development of which is characterized by an abundance of lip service which is inversely proportional to the number of really effective, "hard law" obligations assumed by States.

(b) Pre-Countermeasures Settlement Obligations: Article 12 of Part Two

61. As regards article 12 as adopted in 1993 and provisionally confirmed, *faute de mieux*, in 1994, the Special Rapporteur confines himself to listing, as briefly as possible, the main shortcomings of that formulation.

62. Firstly, the formulation in question almost totally fails to counterbalance the legitimation of unilateral CMs by adequately strict obligations of prior recourse to amicable dispute settlement means (DSMs). On the contrary, an allegedly injured State: (a) would remain free, under the future convention, to initiate CMs *prior* to recourse to any amicable settlement procedure; (b) would only be obliged to have recourse (at any time it may choose) to such procedures as are envisaged by a "relevant"

11/ Following further consideration, the Special Rapporteur believes that the annexes to the latter draft articles (as proposed in 1992-1993) left much to be desired and should have been entirely reformulated (as the Drafting Committee has felicitously done). Their defective formulation was the result of inadvertence.

treaty; 12/ moreover, (c) the obligation thus circumscribed would be further narrowed down if the future responsibility convention were to confine it to such means as third party procedures or, worse, to binding third party procedures; and in addition, (d) the formulation in question completely ignores the problem of prior and timely communication, by the injured State, of its intention to resort to CMs. 13/

63. Secondly - and not less importantly - by not condemning resort to CMs prior to recourse to DSMs to which any participating States may be bound to have recourse under instruments other than the responsibility convention - the only function that we assigned to the requirement of prior recourse - the 1993 and 1994 Drafting Committee's formulation might have a negative impact on the dispute settlement obligations deriving from those instruments. Although they would not be totally annulled, dispute settlement obligations could lose in credibility and effectiveness. Inevitably involved, in any event, in the mere fact of not imposing recourse to amicable means *prior* to CMs, the jeopardy of the said DS obligations would be further aggravated, firstly by the "relevant" treaties clause and secondly, by the exclusion, under the formulation, of some DSMs.

64. The negative impact of the provision in question upon existing DS obligations seems to be more serious than it may appear. Of course, it can be argued that the fact that a responsibility convention did not impose prior recourse to DSMs provided for by instruments in force between the parties - as would be the case under the adopted 1993 Drafting Committee's formulation of article 12 (1) (a) - would not affect the validity of the parties' obligations under such instruments. It could be argued, for example, that since armed reprisals are prohibited - a rule that the convention could not fail to codify 14/ - the CMs to which an injured State could lawfully resort would not contravene the general (and practically universal) obligation to settle disputes by peaceful means as embodied in paragraph 3 of Article 2 of the United Nations Charter. Undoubtedly, lawful CMs are in principle bound to be "peaceful" by virtue of the prohibition of armed reprisals. We wonder, however, whether such a consideration dispels all doubts. Letting aside the question of the extent to which CMs would be compatible with that further requirement (of the same Charter provision of Article 2, paragraph 3) that "international peace and security, and justice, are not endangered", 15/

12/ *Infra*, para. 66.

13/ This requirement was set forth in paragraph 1 (b) of the Special Rapporteur's draft article 12. According to the Drafting Committee's formulation, the injured State would instead be relieved of any burden of prior notification of CMs (no chance of timely "repentance" being thus left for a law-breaker).

14/ See for example article 14 as proposed in 1992 and adopted by the 1993 Drafting Committee, documents A/CN.4/444/Add.3 and A/CN.4/L.480, p. 2.

15/ This point was covered by the Special Rapporteur's draft article 12 (3).

the liberalization of CMs embodied in the 1993 Drafting Committee's formulation of article 12 (1) (a) would not be easy to reconcile with some of the existing dispute settlement obligations. I refer for example to such obligations as those spelled out in Article 33 of the United Nations Charter and those deriving, for any parties in a (real or alleged) responsibility relationship, from bilateral dispute settlement treaties or compromissory clauses. As regards the general Charter obligation, as spelled out in paragraph 3 of Article 2, one finds it difficult to accept the notion that resort to a CM *before* seeking a solution by one of the means listed in Article 33.1 is compatible *de lege lata*, and should continue to be compatible *de lege ferenda* with that Charter provision. 16/

65. The loss of credibility and effectiveness might affect even more seriously, in particular, treaties and compromissory clauses providing for the arbitration of legal disputes not settled by diplomacy (although one can hardly accept the notion that countermeasures qualify as part of diplomacy). A similarly negative effect would be created by the admissibility of prior recourse to countermeasures on the credibility and effectiveness of a jurisdictional link between the parties, deriving from their recognition "as compulsory ***ipso facto*** and without special agreement" of the "jurisdiction of the (International Court of Justice) in all legal disputes concerning": either "the existence of any fact which, if established, would constitute a breach of an international obligation", or "the nature and extent of the reparation to be made for the breach of an international obligation". 17/

66. It should not be overlooked either that by referring to "relevant" treaties only, paragraph 1 (a) of the 1993 Drafting Committee's article 12 would put into question - if it ever became law - the credibility and effectiveness of more than just a part of the existing and future *conventional* instruments of amicable dispute settlement. It would also cast an "authoritative" doubt over any existing rules of *general* international law in the area. Assuming, for example, that paragraph 3 of Article 2 of the United Nations Charter had become a principle of customary international law, would the survival and further development of such a principle not be affected by the provision of a codification convention authorizing any allegedly injured State to resort to CMs ***ipso facto***, namely without any prior attempt at an amicable settlement? Does that principle have the merely negative function of condemning non-peaceful means? Does it not also contain - as we are inclined to believe - positive guidelines of a general scope with regard to the primacy of amicable means as well as "justice" and "international law"? Would an authorized disregard of available amicable means - means spelled out in the Charter itself - not affect the degree of justice of a solution?

16/ No one could seriously argue that since Article 33 (1) refers to disputes "the continuance of which is likely to endanger the maintenance of international peace and security", many disputes arising in the area of State responsibility would not be of such a nature as to fall under the general obligation in question.

17/ Article 36, paragraph 2 of the Statute of the International Court of Justice.

Assuming further that the survival of the general principle in question was not jeopardized, would paragraph 1 (a) of the text under review not jeopardize its further development?

67. The shortcomings of the "suspended" formulation of article 12 of Part Two are probably due, in addition to the great difficulty of the subject and the lack of available time, to the fact that that article was prepared prior to the consideration by the Committee of the proposals concerning the post-CMs dispute settlement provisions, namely, the provisions of Part Three of the project. Debated in plenary at the same session of the Commission, the latter provisions were referred to the Drafting Committee rather late in that session, at a time when it was already debating article 12.

68. A further point that should not be overlooked in reviewing the subject matter at the forty-eighth session is the relationship between majority and minority views within the Drafting Committee. As clearly stated in the 1993 report of the Chairman of the Drafting Committee, the majority of the Committee (as well as, we believe, the majority of the Commission) had pronounced itself in favour of the principle that prior recourse to DSMs should be indicated in article 12 as a condition of lawful resort to CMs. One must wonder, therefore, how it happened that that majority's position was not reflected in the formulation of the article. One explanation might be that the open-ended composition of the Drafting Committee, combined perhaps with the casual absence of some members, brought about a result in obvious contrast with the recognized majority view. The planning group should perhaps review, in the light of that experience, the drafting methods of the Commission.

(c) Post-Countermeasures Dispute Settlement Obligations (Part Three of the Project)

69. With regard to post CMs dispute settlement procedures, the Special Rapporteur finds somewhat satisfactory the provision of the second paragraph of article 5 of Part Three as adopted on first reading last year. By providing for a compulsory arbitration (on unilateral initiative) of any dispute arising following the adoption of CMs, that paragraph practically coincides with the second of the procedures that he had proposed in his draft articles of Part Three of the project. He regrets, at the same time, that the same course was not adopted with regard to the first of the procedures that he had proposed, namely conciliation.

70. The said "loss" (from our point of view) is not adequately compensated by articles 1 to 5, paragraph 1 of the adopted text of Part Three, to the extent that those provisions only envisage procedures which are neither really compulsory nor all-binding. Most of those provisions do nothing more than suggesting to the parties to resort to settlement procedures that, in any event, they are perfectly free to use, regardless of any mention thereof in an international instrument such as a future convention on State responsibility.

71. The adopted system could be improved significantly in two ways.

72. One way would be to turn the conciliation procedure envisaged in article 4, as adopted, into a compulsory procedure to which the injured State

should be bound to submit prior to adopting CMs. We suggest, *mutatis mutandis*, a system similar to that of the Vienna Convention on the Law of Treaties (arts. 65 and 66). The condition of prior resort to conciliation would not apply, of course, to urgent, provisional measures.

73. Another way would be to add to the article on conciliation, as adopted, a paragraph similar, *mutatis mutandis*, to paragraph 2 of article 5. In other words, where CMs had been resorted to by an allegedly injured State, the target State would be entitled to promote conciliation by unilateral initiative.

(d) Interim, Protective Measures Issues

74. Something more needs to be said at this stage - mainly but not exclusively within the framework of the pre-CMs dispute settlement problem - on the role that may or should be played by urgent, protective measures. One must distinguish, in this respect, between provisional measures indicated or ordered by a third party body and provisional measures taken by the injured State unilaterally. We are concerned here with the latter. 18/

75. As regards unilateral interim protective measures, resort thereto by the injured State is contemplated in the Special Rapporteur's 1992 draft article 12 as an exception to that State's obligation of prior recourse to available DSMs. The injured State's right to adopt unilateral interim measures was restrictively qualified - under paragraph 2 (a) and (b) of the cited article - by two conditions. One condition was that the object of the measures should be the protective purpose which is inherent in the concept of interim measures. This requirement would be met, for example, by a freezing - as distinguished from confiscation and disposal - of a part of the allegedly law-breaking State's assets; or by a partial suspension of the injured State's obligations relating to customs duties or import quotas in favour of the allegedly law-breaking State. The second requirement was that the injured State's right to adopt interim measures could only be exercised temporarily, namely "until the admissibility of such measures has been decided upon by an international body within the framework of a third party settlement procedure".

18/ As regards the former, the general rules on the subject are the well-known Article 41 of the International Court of Justice Statute and Article 40 of the United Nations Charter, both provisions using the expression "provisional measures". In the Special Rapporteur's proposals, interim measures by a third party procedure were envisaged mainly in Part Three, namely, within the framework of post-CMs dispute settlement obligations. Under the proposed draft articles of that Part, the third party called to operate with regard to a post-CM dispute should be empowered, by the future convention, to order provisional measures. This would apply to the conciliation commission as well as to the arbitral tribunal or the International Court of Justice. Third party indications or orders of interim measures were also considered, together with unilateral interim measures, in the 1992 proposal of article 12 (2) (a) and (b).

76. Considering that the concept of interim measures of protection might prove to be too broad and imprecise - as rightly (although inconsequentially) pointed out by some International Law Commission members in the course of the 1992 debate - for the injured State's right not to be abused, some further precision could have been spelled out in the paragraph by the Drafting Committee. One of the main hypotheses - but not the only one - where the adoption of interim measures would be justified would be, of course, that of a continuing breach.

77. Much as the future State responsibility convention may ultimately succeed in defining interim measures and the conditions under which they may be lawfully resorted to, a high degree of discretionary appreciation would inevitably remain with the injured State. Three factors, however, should help to ensure a reasonable measure of restraint on the part of the injured State's authorities. One factor should be an accurate, ***bona fide*** appreciation, by the injured State, of the alleged wrongdoer's response to its demand for cessation/reparation. This criterion was expressed more than once, with regard to any kind of countermeasures, in our 1992 proposals. It was inherent in the general concept of "adequate response" from the allegedly law-breaking State (in draft art. 11); and it also appeared in paragraph 2 (a) in the condition of good faith (on the part of that same State) in the choice and implementation of available settlement procedures. A second factor could have been - always within the framework of the 1992 proposals - the condemnation, in paragraph 3 of article 12, of any measure (including an interim measure) "not in conformity with the obligation to settle disputes in such a manner that international peace and security, and justice, are not endangered". The third and most important factor would have been represented, within the framework of the said 1992 proposals, by the post-CM dispute settlement system of Part Three of the project. Any third party body called upon to deal with the dispute under that Part Three (conciliation commission, arbitral tribunal or International Court of Justice) should of course be empowered not only to order interim measures but also to suspend any measures previously taken by the allegedly injured State.

78. The 1993 and 1994 formulation of article 12 does not take any account of urgent interim, provisional measures. The fact that interim measures were not taken into consideration is, in our view, to be regretted. In resuming the elaboration of the 1993-1994 formulation of article 12, the 1996 Drafting Committee should, in our view, take due account of the fact that if interim protective measures were exempted - as suggested - from the requirement of prior resort to dispute settlement means, that requirement would be far less restrictive of the prerogative of unilateral reaction than it was described by some participants in the debate on article 12 in the plenary, as well as in the Drafting Committee in 1992-1994. More considerate thought should be given, therefore, to the role of interim protective measures in the law of State responsibility. To dismiss the matter on the simple argument that interim measures are hard to define would be, in our view, not appropriate.

79. There is much, in international law, which is vague or hard to define and can only be specified by the practice of States and international tribunals. In any case, the vagueness of the concept of urgent, interim protective measures was hardly a good argument against the prior resort to amicable means requirement that was being proposed. The vaguer the concept, the less severe

would be the restriction of the allegedly injured States' discretionary choice to resort to CMs. It is to be hoped that the matter will not be dropped again in 1996.

(iii) Proportionality

80. As indicated in his seventh report, the Special Rapporteur feels uneasy about the formulation of article 13 as adopted on first reading. While fully sharing responsibility for the presence, in that article, of a part of the reference to "the effects thereof on the injured State", we feel that the Commission should give more thought to that sentence and possibly cross it out.

81. As explained in paragraphs 47 to 54 of the same report, the degree of gravity of an internationally wrongful act - whether "delict" or "crime" - depends on a number of factors or elements to the variety of which the exclusive mention of the *effects* - and particularly of the effects **upon the injured State** - does anything but justice. Is it appropriate to limit oneself to the effects - and to the effects upon the injured State(s) - while leaving out such elements as: - the importance of the breached rule; the possible presence of fault in any one of its various degrees (ranging from ***culpa levissima*** to wilful intent or ***dolus***); and the effects upon the "protected object" such as human beings, groups, peoples or the environment? By singling out only the effects upon the injured State does one not send to the interpreter (and States in the first place) a misleading message that may affect the proper evaluation of the degree of gravity for the purpose of verifying proportionality?

82. This preoccupation arises in particular with regard to ***erga omnes*** "delicts" and with regard to all "crimes". In both areas there are far more than one injured State. Even more pointedly the problem arises in the case of "delicts" or "crimes" committed to the detriment of "protected objects" (human beings, groups, peoples or the environment) where an effect upon one or more injured State(s) may well be non-existent or very difficult to determine. The Special Rapporteur trusts that more thought will be given at some stage to the considerations developed in paragraphs 50 to 54 of the seventh report. The 1995 debate concentrated so much - and rightly so - on the crucial issue of the consequences of the internationally wrongful acts singled out as "crimes" in article 19 of Part One that this important point on article 13 was not given all the consideration that, in our view, it deserves.

83. That the above mentioned points had not been the object of sufficient consideration seems to be confirmed by the fact that the arguments against the proposed deletion of the clause "the effects ... on the injured State" were only those summed up in paragraph 300 of the Commission's 1995 report to the General Assembly. After erroneously reducing the criticized deletion proposal to "the case of 'crimes'", that paragraph reads: "it was emphasized that there were precedents which militated in favour of the retention of the clause in the case of delicts, such as the ***Air Transport Services Agreement*** case and that the lack of precedent in relation to "crimes" - a newly invented (***sic***) concept - in itself indicated a dearth of interest (***sic***) on the part of States".

84. Apart from the fact that the deletion was being proposed by the Special Rapporteur for both delicts and crimes, these arguments go beside the point. They seem to disregard completely: (i) the fact that the deletion was intended not to suppress the factor of gravity represented by the effect on the injured State but merely to avoid, by stressing that factor *alone*, neglecting a number of objective and subjective factors, the latter including ***culpa*** and ***dolus*** especially; (ii) the fact that one of the main purposes of the proposed deletion was to take account particularly of ***erga omnes*** delicts as well as of all crimes, a hypothesis of which the ***Air Transport*** case could hardly be considered as an example; (iii) the fact that another major purpose of the proposed deletion was to deal with the case of delicts or crimes the victim of which was not - or not so much - the injured State(s) but some "protected object", such as the law-breaking State's own population or some common object or concern of all States.